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Scott Brigham By Frank E. Brigham, Guadian Ad Litem v. Moon Lake Electric Association, Inc. : Brief of Respondent

IN THE

SUPREME COU

OF THE

STATE OF UT

SCOTT BRIGHAM, by Frank B
Brigham, Guardian ad litem,
Plaintiff

vs.

MOON LAKE ELECTRIC ASSO
ATION, INC., a Utah Corporat
Defendant

BRIEF OF RES

Appeal from Judg
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Uintah County
HONORABLE ALLEN

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MULLINER, PRINCE & MANGUM
GERALD R. MILLER, Esq.
DENIS R. MORRILL, Esq.
KENNETH W. YEATES, Esq.
206 El Paso Natural Gas Building
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Appellant

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IN THE

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OF THE

STATE OF UTAH

SCOTT BRIGHAM, by Frank E. Brigham, Guardian ad litem,
Plaintiff-Appellant,

vs.

MOON LAKE ELECTRIC ASSOCIATION, INC., a Utah Corporation,
Defendant-Respondent.

Case No. 11869

BRIEF OF RESPONDENT

STATEMENT OF FACTS

On the afternoon of June 28, 1968, Frank Brigham took his three sons, Scott, age 10, Michael, age 15, and Stephen, age 12, and a neighbor boy on a trip to look for arrowheads (Tr. 14). They drove to an area east of Roosevelt near Fort Duchesne, Utah, where they stayed overnight in Mr. Brigham's camper (Tr. 15). The following morning they climbed to the top of a mesa and started looking for arrowheads (Tr. 17). Mr. Brigham and his son Michael were parallel to each other and Scott was behind Michael. The other two boys were further back (Tr. 18). They were walking in a northerly direction with the sun shining behind them as they walked across the mesa (Tr. 44). The top of the mesa was a flat, barren piece of terrain (Tr. 45). Moon Lake had contructed a single phase 7200 volt distribu-

tion electric line in the area which cut across the mesa in an east-west direction (Tr. 78). The line consisted of a hot wire and a ground wire. Scott saw the wires, which were "silverish" in color (Tr. 38, 175). One pole of the line was located on the west side of the mesa and another pole was located on the east side (See defendant's exhibits D-1 through D-8). These poles were 125 feet apart (defendant's exhibit D-9). Mr. Brigham saw the pole on the west side of the mesa as he walked under the power line (Tr. 50). On the morning of June 29, 1968, the pole on the east side of the mesa was down (Tr. 24). The wires went from the pole on the west side of the mesa to the insulator on the downed pole at about a 45° angle (Tr. 175). The wires didn't touch the ground but went down into the valley (Tr. 24).

Mr. Bingham heard Michael shout, "Dad!" and he turned and saw Scott hanging from the wire (Tr. 19). Mr. Brigham ran to Scott, and just as he got to him, Scott fell to the ground, apparently lifeless (Tr. 20). Mr. Brigham proceeded to give him mouth-to-mouth resuscitation and revived him (Tr. 20). Mr. Brigham took Scott to the hospital in Roosevelt, Utah where he was given emergency treatment and released (Tr. 23).

At the time of the trial, Scott Brigham testified he could not remember coming to a wire on the mesa (Tr. 174). During the course of cross-examination, the following testimony was read to Scott from his deposition:

> "A (continuing by Mr. Nebeker) Scott, starting on line twenty-four the reporter transcribed a question which I asked you and which reads: 'While you were looking for arrowheads I understand you came across a pole line, a power pole that was down?'
>
> Your answer: 'I didn't notice the pole, but I saw the wire.'

> Then I said: 'Where was the wire that you saw? Was it up in the air or down on the ground?'
>
> Your answer was: It was coming to the ground at about a forty-five degree angle.' "

Scott stated that he thought the answers given at the time of the deposition were right (Tr. 175).

Mr. Ernest Ballard, the general manager for Moon Lake, testified he talked to Scott on the afternoon of June 29, 1968, while he was in his father's camper in the parking lot of the Roosevelt Hospital.

Mr. Ballard stated:

> "A Okay. As near as I recall Scott indicated that he saw his older brother pick up a wire and walk under it and he asked him if it was a hot wire or an electric wire and got an answer 'no,' and apparently from the conversation the next thing he had his hand up against the conductor and he indicated to me that he reached up and touched the conductor which in this case was the actual energized conductor rather than the ground
>
> conductor which his brother had just previously touched and received no problem. I think that's in essence the conversation. There were other things talked about, but I have no recollection at this time." (Tr. 242)

Mr. Ballard testified the servicemen of Moon Lake were instructed to constantly inspect the distribution lines in their area of operation (Tr. 83). He said in two to three months the servicemen would see most of the distribution line in their particular service area (Tr. 83).

Russ Cramer, the line superintendent for Moon Lake, testified the company retired approximately 150 poles each year because of discontinuance of service, road widening (Tr. 181-182) or construction projects such as Starvation

Dam (Tr. 84). These poles are inspected and either put back in the "store" for reuse or discarded (Tr. 182). This becomes a random system of retirement because they never know who is going to leave a farm resulting in idle service (Tr. 85).

Mr. Cramer further testified that he inspected the transmission lines by aircraft after deer season and after winter damage (Tr. 181). The distribution lines are inspected by air at more frequent intervals, depending upon the trouble areas (Tr. 180).

A Mr. Phil Opsal, expert in wood technology and pole line inspections, testified that in his opinion Moon Lake had employed a reasonable inspection system (Tr. 221).

The case was submitted to the jury on special interrogatories. The jury found the defendant negligent and that such negligence was a proximate cause of the plaintiff's injuries *and also that Scott Brigham was negligent and that such negligence was a proximate cause of his injuries. The plaintiff took no exception to the form of the verdict.* Based upon the answers to interrogatories, the court instructed the Clerk to enter a verdict of no cause of action (Tr. 255).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE.

Since the jury found the defendant negligent, Point I of plaintiff's brief is moot. Any error in the instructions cannot be prejudicial because the jury found the defendant negligent.

The only issue on this appeal is whether the trial court

properly instructed the jury on the question of contributory negligence and whether there is sufficient evidence to sustain the finding of plaintiff's contributory negligence.

The court submitted the following instructions on contributory negligence:

"Instruction No. 7

Persons in the position of plaintiff Scott Brigham at the time of the event in question are under a duty to make reasonable observations to learn the conditions confronting him and to take reasonable measures to observe and avoid dangers confronting him. What observations he should make and what he should do for his own safety while thus proceeding are matters the law does not attempt to regulate in detail and for all occasions, except in this respect: It places upon him the continuing duty to exercise the care an ordinary prudent person would observe to avoid an accident, under the circumstances then existing. Failure to discharge that duty would constitute negligence." (R. 153)

"Instruction No. 8

"A child is not bound to exercise the same degree of care for his safety that is required of an adult. While there is no inflexible rule or standard in terms of years which can be laid down as a guide for determining the question of negligence on the part of a child, the law requires of a child that degree of care and caution which is ordinarily exercised by children of the same age, intelligence, capacity, and experience, under the circumstances then existing." (R. 154)

The plaintiff did not except to the court's instructions on contributory negligence. Having failed to except, they should not be allowed to claim error on their appeal.

Rule 51 of the Utah Rules of Civil Procedure provides:

> "* * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds of his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving or failure to give an instruction. * * *"

Although the rule does allow the review of the giving or failure to give an instruction, this court has been reluctant to do so where the party claiming error failed to make a proper exception. See *Kirchgestner v. Denver & Rio Grande Western R. Co.*, 118 U. 20, 218 P.2d 685. (1950).

This court has held that a jury may find a minor child guilty of contributory negligence. In *Rivas v. Pacific Finance Company*, 16 Utah 2d 183, 397 P.2d 990 (1964), a six-year-old plaintiff was riding on a sleigh when he was struck by defendant motorist. The jury found adversely to the plaintiff. This court affirmed the lower court verdict for defendant, stating:

> "We are in accord with the idea that a child is not expected to have the maturity of judgment nor the capacity to cope with danger that an adult would have and consequently, is not held to the adult standard of care. *Nevertheless, a child even of this age has some duty of care for his own safety, and if he fails to observe it can be guilty of contributory negligence.* The requirement is that he exercise that degree of care which ordinarily would be observed by children of the same age, intelligence and experience under similar circumstances." *Id.* at 185, 397 P.2d at 991. (Emphasis added)

The general rule applicable to the situation in the case at bar is stated in 26 Am. Jur. 2d, Electricity §75, pp. 281-282 (1966):

> *"Usually the question of contributory negligence in actions for injuries to infants by coming in contact with a wire charged with electricity is held to be for the jury, especially where the contact with the wire was accidental, or the child was mistaken as to the nature of the wire and no shock was anticipated, or the circumstances were such as to lead the child to believe that no serious harm would result* * * * However, the age, knowledge and experience of a particular infant may be such that his conduct in voluntarily coming in contact with a live wire can be declared negligent by the court, especially where the opportunity for contact with the wire is not presented to one using the premises or the street in an ordinary way." See also 69 A.L.R. 2d 51, §11 (1960). (Emphasis added)

This court has held that contributory negligence of an adult may bar recovery against an electric company for personal injuries caused by electrical transformers. *Koch v. Telluride Power Co.*, 116 Utah 237, 209 P.2d 241 (1949).

Cases in other jurisdictions have indicated that children injured by electricity may be precluded from recovery by their contributory negligence. *Driver v. Potomac Electric Power Company*, 247 Md. 75, 230 A.2d 321 (1967) (17-year-old boy injured when well-drilling rig hit electric transmission line); *Jones v. Kentucky Utilities Company*, 334 S.W. 2d 263, 265 (1960) (15-year-old boy electrocuted while climbing and walking on top of a bridge); *Hamilton v. Southern Nevada Power Co.*, 273 P.2d 760 (Nev. 1954) (16-year-old boy injured when pipe hit power line); *Brush v. Public Service Co. of Indiana*, 106 Ind. App. 554, 21 N.E. 2d 83 (1939) (14-year-old boy injured on transformer); *Hanson v. Washington Water Power Company*, 165 Wash. 497, 5 P.2d 1025 (1931) (11-year-old child climbing fence and tower of electricity).

Defendant contends that Section 54-7-22, Utah Code Annotated, (Rep. Vol. 1953) cited in plaintiff's brief does not alter the existing law regarding the duty of electric

companies, that it does not abolish the defense of contributory negligence, and, therefore, is not in point.

Initially, it should be pointed out that plaintiffs did not plead the statute in their complaint as required by Rule 9(i) of the Utah Rules of Civil Procedure. It was not discussed at the time of the pretrial and was not incorporated in the pretrial order (R. 81-82). It was never mentioned during the course of the two-day trial in Vernal, Utah.

In any event, the statute does *not* abrogate the defense of contributory negligence. It states that the utility will be liable only if such injury or damage is "caused thereby or result(s) therefrom." If the injury or damage was caused or contributed to by the negligent acts or omissions of the plaintiff, then clearly there could be no recovery.

The jury did find the plaintiff was guilty of contributory negligence and that such negligence was a proximate cause of his injuries. Such a finding was based on proper instructions, and on substantial evidence.

POINT II. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING THAT PLAINTIFF WAS CONTRIBUTORILY NEGLIGENT.

In *Brunson v. Strong*, 17 Utah 2d 364, 368, 412 P.2d 451, 453 (1966) this Court stated the following with respect to verdicts by a jury:

> "Due to its acknowledged prerogatives, its advantaged position, and the desirability of safeguarding the integrity of the jury system the courts are and should be reluctant to interfere with a jury verdict and will not do so as long as there is any reasonable bases in the evidence to justify it."

Respondent respectfully urges that there was a reasonable and substantial basis upon which the jury could

have found the plaintiff contributorily negligent. The uncontroverted evidence in the record is that on the morning of the accident the day was clear and that the sun was shining (Tr. 40). Plaintiff's father testified the transmission wires had a silvery appearance (Tr. 45). There was also testimony that the top of the mesa where plaintiff was at the time of the accident was flat and that the brush thereon was relatively low (Tr. 45). The wires were apparently five to five and one half feet off the ground where Scott received the electrical shock (Tr. 30). Plaintiff's father indicates that when he first noticed plaintiff seconds after the accident, plaintiff was "hanging from his right hand" on the wires and plaintiff's left foot was touching the ground (Tr. 19).

A jury, on basis of all this evidence, could reasonably have concluded that the line on which plaintiff was injured was clearly visible to a ten-year-old boy. The fact that these particular lines had a silvery, aluminum-type appearance could be found to have given reasonable warning to a boy of plaintiff's age that the lines were dangerous. The position of the plaintiff immediately after the accident, namely, hanging from his right hand on the wires, could have led a reasonable jury to find that plaintiff had negligently grabbed an activated wire which was clearly visible to him.

In addition, the aforementioned Mr. Ballard testified of a conversation he had with plaintiff on the day of the accident. That testimony was as follows:

> ". . . Scott indicated that he saw his older brother pick up a wire and walk under it and he asked him if it was a hot wire or an electric wire and got an answer "no," and apparently from the conversation the next thing he had his hand up against the conductor and he indicated to me that he reached up and touched the conductor which in this case was the actual energized conductor rather than the ground conductor which his

brother had just previously touched and received no problem." (Tr. 242)

The jury could have found from this testimony that plaintiff, despite his youth, recognized the general danger of electric wires, and specifically recognized the possibility that these wires might be hot. The jury might also have found that even though his brother, Michael, was not electrocuted when he touched the ground conductor that plaintiff was not excused from touching the other conductor which was energized. The mere fact that Michael was not hurt when he negligently touched the ground conductor could reasonably have been found not to justify plaintiff's negligent and voluntary touching of the second, energized wire.

Further evidence from which a reasonable finding of contributory negligence could be based is the testimony of plaintiff contained in his deposition. On cross-examination plaintiff had some difficulty remembering the events at the time of the accident. Counsel for defendant attempted to refresh plaintiff's memory by reading from the deposition:

> "Question (continuing by Mr. Nebeker) Scott, starting on line twenty-four [page 9] the reporter transcribed a question which I asked you and which reads: 'While you were looking for arrowheads I understand you came across a pole line, a power pole that was down?'
>
> Your answer: 'I didn't notice the pole, but I saw the wire.'
>
> Then I said: 'Where was the wire that you saw? Was it up in the air or down on the ground?'
>
> Your answer was: 'It was coming to the ground at about a forty-five degree angle." (Tr. 175)

Although Scott could not remember giving these an-

swers at the time of the trial, he did agree that his memory of the accident might have been better at the time of the deposition than it was at the time of trial (Tr. 176). The jury could have accepted Scott's testimony from his deposition that he saw the wire. They could also have found that he touched it when he knew or should have known that it was dangerous.

Respondent contends there was ample evidence indicating that plaintiff was contributorily negligent and that a jury could so conclude. Because of this evidence the finding of contributory negligence by the jury should not be disturbed.

POINT III

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON DEFENDANT'S DUTY.

The jury found the defendant negligent and that such negligence was a proximate cause of plaintiff's injuries. *In view of this finding, any error in the court's instruction on defendant's duty cannot be prejudicial.* However defendant contends the trial court properly instructed the jury on defendant's duty. The court instructed the jury that the defendant Moon Lake was required to take *exceptional* precautions to prevent an injury from its electrical transmission line:

"Instruction No. 6

> One who has under his control an instrumentality exceptionally dangerous in character is bound to take exceptional precautions to prevent an injury being done by the instrumentality. The degree of care must be equal to the degree of danger involved. A high voltage electric transmission line is an exceptionally dangerous instrumentality and distributors of electricity maintaining such lines are under a corresponding duty to protect the public from danger therefrom.

In this connection such a distributor is obliged to observe due care:

(1) To cause reasonable inspection to be made of such transmission lines, including supporting structures, to discover defects or dangerous conditions therein existing.

(2) To repair or remove dangerous conditions it knows to exist or of which it should know by exercise of due care.

(3) To cause reasonable warning to be given persons in the position of plaintiffs of dangerous conditions of which it knows, or should know by the exercise of due care, but which are not known to them.

Failure of such distributor to act in accordance with the foregoing would constitute negligence on its part." (R. 152)

The plaintiff's failed to except to this instruction. Plaintiff's failure to except to the instruction as required by Rule 51, Utah Rules of Civil Procedure, precludes them from claiming error on this instruction.

The State of Utah is committed to the general rule that an electric company is required to exercise a high degree of care. In the case of *Kimiko Toma v. Utah Power & Light Co.*, 12 Utah 2d 278, 365 P.2d 788 (1961), the administratrix of a deceased workman's estate sued the defendant electric company for the death of decedent. The trial court granted a directed verdict for the defendant and this court affirmed. This court stated the electric company was obliged to meet a *high standard of care*:

"The defendant in this case was engaged as a public utility in furnishing electric power to a large number of customers. It was furnished various persons under different and peculiar circumstances. *In all cases it is required to exercise the degree of care that a person of ordinary prudence would under the circum-*

> *stances.* It is well known that one dealing with electricity deals with a force of dangerous character and that there is a constant risk of injury to person or property if not properly controlled. *The care observed must be commensurate with and proportionate to the danger. Therefore, the defendant company was obliged to meet a high standard of care, which was greater in some cases than another depending on the exigency of the service rendered."* *Id.* at 282-283, 365 P.2d at 791 (Emphasis added).

All jurisdictions considering the question have held electric companies are not liable for injuries unless guilty of a wrongful act:

> "Electrical companies are not insurers of the safety of the public or of those whose occupation is likely to bring them into dangerous contact with their appliances, and hence *are not liable for injuries unless guilty of some wrongful act or omission."* 29 C.J.S. Electricity §38, p. 1057 (1965) (Emphasis added).

Cases from 34 jurisdictions are cited as authority for the above proposition. *Id.* at pp. 1057-1058.

The following cases illustrate the standard of care applicable to power companies. In *Roos v. Consumers Public Power District,* 171 Neb. 563, 106 N.W.2d 871 (1961), plaintiff sued the defendant power company for damages allegedly sustained when a power line broke. Plaintiff alleged the defendant had failed to make proper inspection of the lines. The Supreme Court of Nebraska reversed a lower Court decision adverse to the electric company. The Court held:

> "A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines. The degree of care varies with the circumstances, but it must be commensurate with the dangers involved, and where

> wires are designed to carry electricity of high voltage, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business to avoid injury to persons and property [citations]. *Electric companies are not insurers of the safety of the public and hence are not liable for injuries unless guilty of some wrongful act or omission* [citation]." 106 N.W. 2d at 876

In *Dillard v. Southwestern Public Service Company*, 73 N.M. 40, 385 P.2d 564 (1963) plaintiff, an operator on an oil well servicing truck, sued the defendant utility for personal injuries incurred when the mast of the well came into contact with a power line. The lower Court granted defendant's motion for summary judgment and the Supreme Court of New Mexico affirmed, indicating with approval an earlier case wherein it was stated:

> ". . . the correct measure of care owed by one handling high-power electrical current [is] to be the exercise of a degree of care in the construction and maintenance of its lines 'commensurate with the danger to be apprehended . . . but they are not insurers against accidents or injuries.' " 385 P.2d at 566.

And in *Foote v. Scott—New Madrid—Mississippi Electric Coop.*, 359 SW 2d 40 (Mo. App. 1962) the parents of a sixteen year old boy brought an action for wrongful death against defendant. The evidence indicated the boy threw a copper wire attached to a tin can over an electric power line and was electrocuted. The appellate court reversed a trial court judgment for plaintiff. The Court held:

> ". . . although, the judicial declarations in this jurisdiction have firmly fixed and uniformly adhered to the utmost or highest degree of care as the required standard, it is perfectly plain that here, as elsewhere [citation], an electric company is not an insurer of the safety of persons and property, and that its liability vel non in a given situation is determinable upon prin-

ciples of negligence." *Id.* at 43. See also *Eastern Shore Public Service Company v. Corbett*, 277 Md. 411, 177 A.2d 701, 709 (1962); *Alabama Power Company v. King*, 190 So. 2d 674, 679 (Ala. 1966); *Hercules Powder Company v. Di Sabatino*, 188 A.2d 529, 533 (1963).

Counsel for respondent have been unable to find any American case holding an electric company strictly liable for damages under either an ultrahazardous activity or product liability theory. The *Cornucopia Gold Mines v. Locken*, 150 F.2d 75 (9th Cir.), *cert. den.*, 326 U.S. 763 (1945) case referred to in Appellant's Brief (pp. 7-8) sets a negligence standard for power companies, and does not depart from the general rule.

The trial court's instruction regarding defendant's duty is a clear statement of the law and fully covered plaintiff's allegations of negligence.

CONCLUSION

Plaintiffs should not be allowed to try their case on one theory in the trial court, and having lost, try another theory in this court. This is particularly true where they took no exceptions to the court's instructions. The trial court properly instructed the jury on the issue of contributory negligence. The jury found the plaintiff guilty of contributory negligence and that such negligence was a proximate cause of his injuries. This finding was based on substantial evidence. The judgment of the lower court should be affirmed.

Respectfully submitted,

RAY, QUINNEY & NEBEKER
STEPHEN B. NEBEKER, Esq.
JAMES L. WILDE, Esq.
400 Deseret Building
Salt Lake City, Utah 84111